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ELDER LAW MINUTE

Last week, I introduced the case of *Albert v. Cowart*. As you may recall, Doris King's nephew/attorney-in-fact, Kim Cowart, opened a joint bank account with Doris the week before she died, and transferred \$460,000 into the account. Upon Doris's death, the money in the account became Kim's. Sherry Albert, Doris's step-daughter and contingent beneficiary under the Will sued to bring the account into the Estate.

The trial court dismissed Sherry's claims of constructive fraud and conversion, but held that the account should not have been set up with rights of survivorship. Kim appealed.

On appeal, Sherry argued that Kim had breached his fiduciary duty when he transferred Doris's assets into a joint account with himself. She argued that Kim's power of attorney did not allow gifting and the transfer into the new account was tantamount to a gift. Sherry also argued that Kim was unjustly enriched by surviving his aunt.

Kim argued that he did not breach his fiduciary duty since the joint account was opened by Doris through her letter of instructions to the bank, and Doris authorized all of the transfers to the account. It was only through the operation of law after Doris died that the assets passed to Kim.

The North Carolina Court of Appeals concluded that Kim made no gift to himself, did not breach his fiduciary duty and reversed the trial court's finding with regard to the joint account, finding that it was properly established with rights of survivorship. 682 S.E. 2d at 779. The Court noted that:

To make a gift inter vivos there must be an intention to give coupled with a delivery of, and loss of dominion over, the property given, on the part of the donor. Donor must divest himself of all right and title to, and control of, the gift. Such gift cannot be made to take place in the future.

I was very surprised by this result. Sherry must have been a piece of work!